Before the
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In the Matter of	)	
Distribution of the 1998 and 1999	)	Docket No. 2001-8 CARP CD 98-99
Cable Royalty Funds	)	

PROGRAM SUPPLIERS' PETITION TO MODIFY OR REJECT THE PANEL REPORT DATED OCTOBER 21, 2003

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GLOSSARY

Bortz Study:	Cable Operator Valuation of Distant Signal Non-Network Programming, JSC Exhibit ___
CRT:	Copyright Royalty Tribunal
CARP:	Copyright Arbitration Royalty Panel
Claimants:	Copyright Owners Participating in the 1990-92 Copyright Royalty Distribution Proceeding
Librarian:	Librarian of Congress
Nielsen:	Nielsen Media Research
Nielsen Studies:	Distant Viewing Report for 1998 and 1999 prepared by Nielsen
Panel:	Copyright Arbitration Royalty Panel for the distribution of the 1998 and 1999 cable royalties
PFFCL:	Proposed Findings of Fact and Conclusions of Law
W.D.T.:	Written testimony submitted by witness in claimant's direct case
W.R.T:	Written testimony submitted by witness in claimant's rebuttal case
1979 CRT Proceeding:	47 Fed. Reg. 9879, 1979 Cable Royalty Distribution Determination (March 8, 1982)
1983 CRT Proceeding:	51 Fed. Reg. 12792, 1983 Cable Royalty Distribution Determination (April 15, 1986)
1989 CRT Proceeding:	57 Fed. Reg. 15286, 1989 Cable Royalty Distribution Determination (April 27, 1992)
1990-92 CARP Proceeding:	CARP Report, 1990-92 Cable Royalty Distribution Determination (May 31, 1996)

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Program Suppliers, in accordance with Section 251.55(a) of the rules governing the procedures for Copyright Arbitration Royalty Panels ("CARP"), hereby file this petition to modify or reject The Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress dated October 21, 2003 ("Panel Report") in the referenced proceeding. For the reasons detailed below, the Panel Report is arbitrary and contrary to the applicable provisions of Title 17, and therefore must be rejected. Program Suppliers request that the Librarian issue an order setting a distribution of royalties that is reasonable, and in accordance with the evidence adduced at this proceeding and the statutory plan.

I. INTRODUCTION

At its core, the Panel Report represents a fundamental sea change in both the manner and method used to distribute cable copyright royalties. All prior decisions and their rationale were abandoned in favor of what *this* Panel perceived to be the "best" methodology. The Panel chose to visit the burden of this change almost exclusively on the Program Suppliers.[1] While nearly every other claimant category received awards that were substantially higher than in previous years or remained roughly the same, Program Suppliers' share declined by approximately 17

[1] Program Suppliers continue the familiar shorthand for identifying the claimant categories: PS = Program Suppliers; JSC = Joint Sports Claimants; NAB = Commercial Television Claimants; PTV = Public Television Claimants; Canadian Claimants and Music Claimants are simply identified as such.

percentage points from its prior award – about a 32% reduction. Such a dramatic and substantial reduction in Program Suppliers' share is not supported by the record evidence or the Panel's analysis.

The Panel Report demonstrates a fundamental lack of understanding of the compulsory license scheme, the prior decisions establishing awards in cable distribution proceedings, and the cable television marketplace in general. In reaching its decision, the Panel inappropriately ignored precedential rulings of the Librarian, the Copyright Royalty Tribunal ("CRT" or "Tribunal"), and the prior CARP, and applied a standard that is at odds with the Copyright Act. In addition, the Panel inappropriately overlooked and, thus, failed to consider evidence that demonstrated that the conclusions reached by the Panel were wrong. Finally, the Panel Report is full of internal inconsistencies and contradictions so as to make it a wholesale failure of reasoned decisionmaking. Each of these failures alone require rejection and/or modification of the Panel Report.

A. THE PANEL FAILED TO FOLLOW PRECEDENT.

It was arbitrary for the Panel to abandon precedent without justification. The Panel's decision to abandon prior rulings and visit a substantial reduction on Program Suppliers was done without adherence to the well-known criteria for altering awards: finding "changed circumstances" or after consideration of "new evidence" demonstrating that a prior decision was wrong. Indeed, the Panel failed to rely on prior precedential rulings regarding the award for Program Suppliers but did rely on prior rulings in setting new awards for PTV and Music. The inconsistent treatment of similarly situated claimants is further evidence of arbitrary decisionmaking.

B. THE PANEL IGNORED RELEVANT, COMPELLING EVIDENCE CONTRARY TO ITS CONCLUSIONS.

The Panel ostensibly found that "only one distribution criterion appears to have stood the 'test of time' and has served as the principal basis for allocating cable copyright royalties – relative marketplace value." Panel Report at 9. Despite this acknowledgment, the Panel turned a blind eye toward all evidence of marketplace behavior presented by Program Suppliers that directly demonstrates how the marketplace valued various programming choices. That evidence, which includes actual data of how cable system operators ("CSOs") actually spend their funds to purchase programming, demonstrates that CSOs allocate funds in existing markets in accordance with program viewing. PS PFFCL ¶¶ 280-92. That evidence of actual conduct is in sharp contrast to the hypothetical allocations given by the Bortz Study respondents for the movies and syndicated program categories. It was arbitrary for the Panel to accord the Bortz Study the preeminence it did and to totally disregard the evidence of actual behavior presented by Program Suppliers.

As was shown in prior proceedings, the Bortz Study has inherent conceptual and executional flaws, such as the short length of the interviews, the attitudinal nature of the study and the lack of a "supply side" perspective. Panel Report at 19. Those flaws precluded full acceptance of the Bortz Study by past decisionmakers, and were not remedied in the 1998-99 Bortz Study. Other flaws, such as the miscategorization of program categories – the *sine qua non* of the study – were also established in this proceeding. Tr. 1334. For example, one of the JSC witnesses, Michael Egan, demonstrated that Bortz cannot be accepted at face value due to the ease in which respondents can miscategorize program types. *Id.* Notwithstanding these flaws, the Panel blessed the Bortz Study with full acceptance. Panel Report at 31. Indeed, the Panel credited the testimony of Mr. Egan, as it did those of many other witnesses, when it

supported the Panel's ultimate conclusion, but the Panel ignored testimony of the same witnesses when that testimony demonstrated that the Panel's conclusion was wrong. *Id.* at 29-31. Such inconsistent treatment is a hallmark of arbitrary decisionmaking.

Conversely, the Panel failed to credit nearly all of Program Suppliers' evidence of program viewing because it did not agree that the 18-49 demographic group was the appropriate viewing demographic on which to focus, and because adjustments to raw viewing data (the Nielsen Studies) proposed by Program Suppliers were, in the view of the Panel, conceptually flawed. *Id.* at 42. As demonstrated below, the Panel's conclusions evince a fundamental lack of understanding of the cable television marketplace, are not supported by the record, and more importantly, fail to acknowledge that the alleged flaws were demonstrated to be meaningless. For the Panel to reject evidence based on meaningless criticisms is arbitrary. Finally, even if the Panel disagreed with the focus on the 18-49 demographic and the adjustments to raw viewing data proposed by Program Suppliers, its decision to completely ignore all evidence of program viewing is, without doubt, radically wrong and unprecedented.

C. NUMEROUS OTHER FLAWS AND INCONSISTENCIES DEMONSTRATE ARBITRARY DECISIONMAKING.

In addition to the arbitrariness flowing from the Panel's failure to follow precedent and its failure to consider and appropriately evaluate Program Suppliers' and other claimant's relevant evidence, the Panel Report demonstrates that the Panel applied different decisional standards to different claimants without justification, and arbitrarily adjusted awards without adequate explanation.

For example, the Panel adopted a "fee generation" based award for Canadian Claimants but refused to adopt one for PTV, without explaining why it was appropriate for one claimant category but inappropriate for the other. *Id.* at 69, 73. Similarly, one of the relevant decisional

issues – changed circumstances, was evaluated as to PTV, Canadians and Music, but ignored for Program Suppliers, NAB and JSC. *Id.* at 61, 64, 65-69, 71, 76. There are no distinctions warranting the application of different evaluative criteria between the claimant groups. Accordingly, the disparate treatment is arbitrary.

Similarly, the Music Claimants' share was only minimally reduced, allegedly because alternative valuation methods were not "time tested." *Id.* at 53. By contrast, the Panel rejected, with minimal discussion, Program Suppliers' time tested and well accepted viewing study results and analysis in determining marketplace value.

In sum, the Panel's decision represents an arbitrary action because it is based on the application of inappropriate standards, fails to give adequate deference to prior controlling precedent, disregards or fails to evaluate and discuss the evidence contrary to the decision the Panel desired, and is contrary to the record evidence in a number of demonstrable areas. It must therefore be rejected or substantially modified.

II. STANDARD OF REVIEW

Section 802(f) of the Copyright Act authorizes the Librarian to adopt or reject a panel report and states that the Librarian shall adopt the determination of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." 17 U.S.C. § 802(f); *see also* 37 CFR § 251.55. The Librarian has noted that "the use of the term 'arbitrary' in this provision is no different than the 'arbitrary' standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A)." 1993-97 Phase II Distribution Proceeding, 66 Fed. Reg. 66433 (December 26, 2001)(citations omitted).[2]

[2] While the statute requires the application of the arbitrary standard, the justification for applying that standard here is unclear. Generally, *agencies* are afforded deference due to specialized expertise in the area entrusted to them. *NAB v. Librarian of Congress*, 146 F.3d 907, 923 n. 13 (D.C. Cir. 1998). In 1993, however, the CRT system was abolished and replaced with "*ad hoc*" panels of arbitrators known as CARPs. An *ad hoc* panel of arbitrators with no

An arbitrary determination can take different forms. For example, an arbitrary award is an "award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award." *Nat'l Ass'n. of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 923 (D.C. Cir. 1998). Thus, "the Panel must provide a detailed rational analysis of its decision, setting forth specific findings of fact and conclusions of law." 1993-1997 Phase II Distribution Proceeding, 66 Fed. Reg. 66433 (citing *Nat'l Cable Television Ass'n. v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1091 (D.C. Cir. 1992)). Relatedly, when evaluating evidence submitted by parties to an administrative proceeding, the record as a whole must be considered. An agency acts arbitrarily if it picks and chooses between evidence in order to support its decision. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)("The substantiality of evidence must take into account whatever in the records fairly detracts from its weight.").

Arbitrary determinations will also result when an agency fails to consider or adequately address issues raised by a party. *NorAm Gas Transmission Company v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1990)("In the present case, the Commission not only failed to provide an adequate response to NorAm's argument, it failed to take seriously its responsibility to respond at all. As we have said before, '[i]t most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it – that it conduct a process of *reasoned* decision-making.'") (citation omitted).

Moreover, when an agency fails to consider an obvious and less drastic alternative, even if not raised by a party, it acts arbitrarily. *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 746 n. 36 (D.C. Cir 1986) (noting that the "failure of an agency to consider obvious

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special expertise or experience in either copyright law or cable television deserves little deference. *Id.* (noting that Librarian's expertise and oversight of the CARPs is the source of deference by the courts).

alternatives has led uniformly to reversal) (citations omitted). Departures from established precedent that are not adequately explained also are deemed arbitrary. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)("An agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from tolerably terse to intolerably mute.")

New policies that are applied to affected parties, without prior notice, are also deemed arbitrary. The Administrative Procedure Act requires that a person involved in an agency adjudicatory hearing "shall be timely informed of ...[the] law asserted." 5 U.S.C. § 554(d)(3). Courts have uniformly held that for an agency to meet this obligation where it seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the party before the agency must be given notice and then opportunity to introduce evidence bearing on the new standard. *See Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981).

Finally, as to the deference accorded administrative decisions, it is important to note that "any standard of review must be adapted to fit the administrative decisionmaking process to which it is to be applied" – in this case, that of an *ad hoc* panel of arbitrators, rather than the Librarian itself. *See Nat'l Association of Broadcasters*, 146 F.3d at 922 (noting that as a decisionmaker acquires greater experience with a particular administrative scheme, the standard of review may become more rigorous).

III. ARGUMENT

A. THE PANEL ABANDONED PRECEDENT WITHOUT EXPLANATION OR JUSTIFICATION.

1. The Panel's decision to dramatically reduce Program Suppliers' award without finding changed circumstances or "new evidence" was arbitrary and contrary to previously adopted standards.

The Copyright Act requires that the Panel "act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations and rulings of the Librarian of Congress..." 17 U.S.C. § 802(c). The Panel refused to acknowledge and follow prior decisions of CRTs, the prior CARP, and the Librarian in determining Program Suppliers award.

The Panel identified the two situations in which it could validly change a prior award. First, the Panel recognized that the extreme of "changed circumstances" might warrant a reduction or increase in an award. Panel Report at 13. Second, the Panel recognized, quoting the D.C. Circuit, that "[I]f a claimant presents evidence tending to show that past conclusions were incorrect, the Tribunal [CARP] should either conclude, after evaluation, that new evidence is unpersuasive or, if the evidence is persuasive and stands unrebutted, adjust the award in accordance with that evidence." Panel Report at 14 (citing *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 932 (D.C. Cir 1985)). However, the Panel reduced Program Suppliers' award without analyzing changed circumstances and without identifying any "new evidence" that it evaluated and found to be persuasive so as to command the complete eradication of Program Suppliers' prior award.

In this case, the Panel set forth a new standard and rejected more than 20 years of precedent according weight to viewing as a significant factor in determining relative

programming value and in the process reduced Program Suppliers' share by about 32%. According to the Panel, it

> could either: (1) use the previous CARP's allocations as a starting point, and then conduct an exhaustive analysis of any and all changed circumstances that might conceivably justify an adjustment of the previously assigned relative valuations; or (2) assign relative valuations through utilization of one or more methodologies that provide reliable estimate of current (during the years 1998 and 1999) relative valuations.

Id. at 14. There are two problems with the Panel's newly defined "standard."

First, contrary to the Panel's stated framework, it *must* use the previous CARP's allocations as a starting point. *Nat'l Ass'n of Broadcasters, supra* at 772 F.2d at 932. While it can, upon a proper showing, adopt a different methodology, it is not free to do so without using the existing allocation methodology as a departure point. The Panel's assertion that it can simply "assign relative valuations through utilization of one or more methodologies that provide reliable estimate of current (during the years 1998 and 1999) relative valuations," Panel Report at 14, would relieve it of explaining *why* it was abandoning the existing methodology. In other words, it cannot simply choose another methodology because it finds the methodology reasonable.

Second, the Panel can only depart from the existing allocation methodology where it either finds "changed circumstances" or that the earlier methodology was wrong. *Id.* It cannot, therefore, adopt "one or more methodologies that provide reliable estimates of current...relative valuations." Panel Report at 14. Rather, it must, at a minimum, first find that the existing methodology is incorrect or that circumstances have changed. Its failure to do so infects the Panel's entire decisionmaking process. Accordingly, deviation from prior decisions by this Panel was unwarranted and arbitrary.

2. *The Panel departed from prior orders without adequate explanation or justification.*

Historically, two pieces of evidence have been the staple of cable distribution proceedings: the Nielsen Studies and the Bortz Study. The Nielsen Studies measure and report by claimant categories, (except for Music and Canadian claimants) viewing to distantly retransmitted broadcast signals. Prior to the 1990-92 CARP Proceeding, the Nielsen Studies data were gathered through recorded diaries of individual subscribers. Beginning with the 1990-92 CARP Proceeding, Nielsen began presenting data that had been collected by the far more sophisticated electronic People Meter.

The Bortz Study is a survey which asks cable operators to assign valuations to certain program categories based upon a constant sum of 100. The Bortz Study is an attitudinal survey.

Both Nielsen Studies and the Bortz Study are fundamentally conceptually different studies – the former a study of *actual behavior* of subscribers who receive distant signals, the latter a study of the *attitude* of the cable operators who carry those distant signals. The differing approaches have resulted in highly disparate study results. However, the CRTs and the prior CARP have placed value on both perspectives. For this reason, each previous decision has meshed the two perspectives, which while not completely satisfying any one party, has clearly given significant credit to each major study.

The Panel apparently accepted the characterization of prior distribution rulings by the litigants to this proceeding, seemingly without reviewing the prior orders, and erroneously concluded that, over time, the weight afforded the Nielsen Studies (and indeed all other evidence of viewing) had diminished, and that the weight afforded the Bortz Study had increased. Panel Report at 18-19. Contrary to the Panel's stated conclusions, nothing in prior decisions suggests that those decisionmakers decreased the weight accorded the Nielsen Studies. While the Bortz

Study, like the Nielsen Studies, may have become increasingly more reliable over time, past decisions do not suggest that this increased reliability corresponds to a point-for-point decreased reliance on the Nielsen Studies. Cf. Panel Report at 33. Indeed, both the Nielsen Studies and Bortz Study in the past have been found to have limitations. Despite the limitations, past decisions have never waivered from the conclusion that the Nielsen Studies remain an integral part of the calculus for determining the marketplace value of programs. 1990-92 CARP Report at 112. If anything, the Nielsen Studies presented in the instant proceeding, which even the Panel concedes have no serious methodological flaw (Panel Report at 37-38), are by far the most sophisticated and reliable in the history of the proceedings. The studies present not only household viewing results, but also viewing by demographic groups as well as viewing divided into quintiles.[3] Moreover, the accompanying economic and other qualitative analyses demonstrate beyond doubt that during the 1998-99 period, viewing remained a critical determinant in the value of programming.

a. The Panel incorrectly concluded that the Bortz Study should be accorded more weight and the Nielsen Studies accorded less weight.

Both the Nielsen Studies and the Bortz Study have remained conceptually the same over the years. Both studies also have made methodological improvements (executional, data gathering and procedural) over the years. Puzzlingly, the Panel recognizes, and even praises, the methodological improvements made to the Bortz Study, but maintains virtual silence regarding those made to the Nielsen Studies. Panel Report at 18, 52. The Panel does not even distinguish between diary and meter studies. By failing to acknowledge these notable improvements, the

[3] Nielsen provided viewing for 2+, 2-17, 18-49, and 50+ demographic groups. PS PFFCL at ¶¶ 228 (p. 35). Nielsen also reported in quintiles (i.e. by groupings of households or individual blocks of 20% of the total sample segregated by relative amount of television viewing). Nielsen provided the quintiles to show that viewing results are not unduly

Panel clearly has lumped all Nielsen Studies together and erroneously made them out to be the same. What results is a misimpression that the Nielsen Studies somehow have failed to improve over the years and thus have become less reliable. By ignoring the improvements in the Nielsen Studies, and focusing solely on Bortz's methodological improvements, the Panel tried to make the case that the Bortz Study gained more methodological validity than the Nielsen Studies from proceeding to proceeding.

Criticisms notwithstanding, past decision-makers have all found the Nielsen Studies to be both valid *and relevant* to the essential determination the Panel is asked to reach. In the 1979 CRT Proceeding, the Tribunal described the Nielsen Studies as the "single most important piece of evidence in the record" and a useful "starting point." 47 Fed. Reg. 9879, 9892 (March 8, 1982).

The basic conceptual issue of whether viewing studies or attitudinal surveys are the most relevant evidence was first addressed in the 1983 CRT Proceeding. The 1983 CRT did not merely reiterate its 1979 decision about the Nielsen Studies, it concluded that "the Nielsen Study has features to it that are superior to an attitudinal survey, which have led us to give it far greater weight than any other piece of evidence." 57 Fed. Reg. 12792, 12808 (April 15, 1986). The 1983 CRT noted some flaws in the Nielsen Studies, but also recognized improvements in the studies stating that, "[w]ith all these reservations in mind, the Tribunal still maintains that the Nielsen data are most useful, and help to develop the 'zone of reasonableness' for the Tribunal's allocation." *Id.*

With regard to the different conceptual approaches to program valuation, the 1983 Tribunal stated:

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influenced by heavy viewing-individuals and that heavy-viewing individuals generally do not behave differently from the rest of the viewing audience. PS PFFCL at ¶¶ 238-39 (p.37).

> We also favor Nielsen data over attitudinal surveys presented in this proceeding for several reasons. The Nielsen study was the only study conducted in 1983. All other surveys were conducted in late 1984 or 1985. We agree with the recall problem noted by the Program Suppliers. Although we appreciate the parties' difficulties in preparing for Tribunal proceedings, that difficulty does not cure the defect of the recall problem. *More importantly, the Nielsen survey is the only survey to measure behavior.* As Paul Virtz, a surveyor testifying on behalf of the Devotional Claimants stated, *it is recognized by surveyors that how people say they behave and how they do behave are quite different.* This difference is exacerbated by the very nature of asking a subscriber or a cable employee over the phone to engage in a twenty minute exercise of allocating program preferences. The exercise is brief, takes into accounting 'real world' factors such as supply, local franchising requirements, etc., and carries no consequences. We agree with Dr. Besen's criticism of attitudinal surveys that asking cable operators and/or subscribers to calculate programs does not take supply into accounting, so that all we are measuring is the benefit side of the equation, not marketplace value.

Id. at 12807-09 (emphasis added). It is unmistakable that the 1983 Tribunal strongly preferred the conceptual approach to valuation supported by the Nielsen Studies. It considered the Nielsen Studies far superior to attitudinal survey evidence principally because the Nielsen Studies measured actual conduct. The Tribunal noted that, by contrast, attitudinal surveys, *inter alia*, suffered from the disconnect between expressed attitude and actual conduct. Not surprisingly, although the Tribunal did not award Program Suppliers their Nielsen Studies share, it awarded Program Suppliers well-above its Bortz Study share. While subsequent opinions may have criticized Nielsen's methodology (*i.e.*, execution or data gathering methods), those opinions did not disturb the legal conclusion established in the 1983 CRT proceeding that the Nielsen Studies' conceptual approach, which measures actual conduct, is preferred over a survey of attitudes.

In the 1989 CRT Proceeding, the Tribunal focused not on which conceptual approach better predicted marketplace value of programs (having already settled that issue in the 1983 proceeding), but on how each approach was executed. Analyzing the validity and relevance issues separately, the Tribunal concluded:

> As in the 1983 proceeding, the Tribunal found both surveys [Nielsen Studies and the Bortz Study] essentially valid and relevant, but neither survey is perfect and neither survey provides the entire answer to the question of what each party should rightfully receive.

57 Feg. Reg. 15286, 15299 (April 27, 1992).

Although both Nielsen Studies and the Bortz Study received some criticisms as to their validity, neither was wholly accepted or rejected. The Tribunal criticized the Nielsen Studies' validity mainly for the use of the diary method and the potential that method held for inaccuracies. *Id.* at 15300-301. As noted above, diaries are no longer used as the source of Nielsen data so this criticism does not apply to the study presented in this proceeding. PS PFFCL ¶ 252. Notwithstanding the methodological criticisms, the 1989 Tribunal found the Nielsen Studies to have continuing validity stating that none of the criticisms invalidated the Nielsen Studies and that the studies remained "a reliable and important piece of evidence for the Tribunal's allocation decision." *Id.* at 15300.[4]

As to relevance, the 1989 CRT found both studies to be relevant, but did not fully embrace either. With regard to the relevance of the Nielsen Studies, the Tribunal noted that the study results did not necessarily equal value because other factors such as age, income level and other demographics may be relevant.[5] *Id.* at 15300. Regardless, the Tribunal similarly

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[4] In the 1989 Tribunal's analysis of validity of the Bortz Study, it found the study flawed in the areas of its category definitions, respondents' ability to recall programming, lack of qualifications of some respondents and the short duration of the interviews. *Id.* at 15301. The Tribunal however also reached a conclusion as to the Bortz Study similar to the conclusion reached regarding the Nielsen Studies, stating that "*as with the Nielsen Study*, we consider the Bortz survey to be valid, and a key part of our determination." *Id.* at 15301. Remarkably, this CARP quoted this language from the 1989 CRT decision *but omitted the reference to the Nielsen Studies*. See Panel Report at 18.

[5] Importantly, the 1989 Tribunal did not state that the Nielsen Studies results could not equal value. Program Suppliers' testimony in the instant proceeding incorporates the additional relevant factors identified by the Tribunal. The 1998-99 Nielsen Studies results reported by household and demographic groups, evidence of cable operators' actual behavior (including viewing centric carriage patterns and demographic-related infrastructure investments), and actual license fees paid for programs are among some of the evidence offered by Program Suppliers in this proceeding establishing that viewing can indeed equal value. Dr. Gruen's analysis of some of these factors remains the most objective and detailed analysis of actual program valuation in this proceeding.

concluded that the objective distinction between programs offered by the Nielsen Studies provided "the necessary ingredient to weight the value of each program -- reliable estimates of actual viewing by distant cable subscribers." *Id.* at 15301. As in the 1983 CRT proceeding, the 1989 Tribunal again deemed the Nielsen Studies a useful "starting point" in its analysis.[6]

Although the ultimate award to Program Suppliers in the 1989 CRT Proceeding was less than the Nielsen Studies results indicated, the award to Program Suppliers was again well above its Bortz Study shares. Contrary to the Panel's assertion in the instant proceeding, the 1989 CRT decision did not explicitly or implicitly decrease the "weight" accorded the Nielsen Studies as a concept critical to the determination of program value.

The 1990-92 CARP Panel decision was consistent with the prior CRT decisions with regard to the importance of the Nielsen Studies. The 1990-92 CARP acknowledged that alleged problems concerning miscategorization and nonresponse rate - issues related to execution of the studies - had no measurable effects on the validity and relevance of the study results. *Id.* at 42. The 1990-92 CARP stated further:

> Certainly viewing is a significant factor in value. Cable networks and broadcast stations, which together provide all of the programming for cable systems, use Nielsen ratings in pricing their programs to cable systems and advertisers. Measured against these facts is the contention by the proponents of the Bortz surveys that while advertising is significant to those industries, it is not important to cable systems. Cable systems, they argue, care about attracting subscribers and viewing does not translate into subscribers. We find that argument of value but not totally persuasive. *It is disingenuous to say that the cable system is interested only in attracting subscribers but is totally unconcerned with whether or not the subscriber, in fact, watches the programming.* As was stated by Sieber, who testified for the Program Suppliers, cable system operators are more willing to carry the more heavily watched, higher rated services. Cable system operators receive Nielsen data in a variety of ways.

[6] The Tribunal also refused to fully accept the Bortz Study finding that (1) without taking account of the seller's side the results were questionable; (2) the inability of a constant sum methodology to account for availability and convenience of programming; and (3) the short duration of the interviews. *Id.* at 15301. The Tribunal however gave "substantial weight" to the Bortz Study results where such results were corroborated by other evidence. *Id.*

Id. at 43-44 (emphasis added).

The 1990-92 CARP concluded its discussion as follows:

> [W]e accept the Nielsen data for what it purports to be, a survey of actual conduct with adequate accuracy for the larger claimant groups in particular. We cannot quantify the Nielsen statistics as evidence of market value other than to say that actual viewing is very significant when weighed with all other factors.

Id. at 44.

The 1990-92 CARP also did not fully embrace the Bortz Study because of limitations inherent in the study. That CARP noted, as did the 1989 CRT, that the Bortz Study did not take the supply side into account. *Id.* at 65. Additionally, the Panel noted a problem with the execution of the Bortz Study in that it asked respondents "to decide the value of individual components of different stations and then aggregate them in a manner they had never seen, and, in a relatively few minutes, assign a value to each of those categories." *Id.* at 66. Finally, the 1990-92 CARP noted, as a limitation, the fact that the Bortz Study was a study of attitudes, which by all witness accounts, was inferior to a survey of actual conduct. *Id.* The 1990-92 CARP concluded its analysis of the Bortz Study thusly:

> In conclusion, the Bortz survey is well designed and attempts to ask the right question, but does not quite do so. However, even if it did so, it still is constrained by the inherent limitation that it is a study of attitudes. Conducting a survey in such a short time, and asking the operators to categorize programming in an unfamiliar way, precludes its acceptance *in toto*. Considered as a whole, the panel nonetheless finds the Bortz survey highly valuable in determining market value.

Id. Unquestionably, the 1990-92 CARP viewed the Nielsen Studies, like previous Tribunals, as highly relevant to the determination of market value despite its perceived limitations. Unlike this Panel, it also refused to totally accept the Bortz Study results. It weighed all of the evidence accompanying the Nielsen Studies and awarded Program Suppliers a much higher share than

their Bortz Study share. Therefore, the actual 1990-92 CARP decision stands in sharp contrast to this Panel's view that the Nielsen Studies had no relevance to the determination of value.

Contrary to the Panel's conclusion, nothing in the above-discussed prior decisions suggests that the Nielsen Studies were downgraded to a less relevant status, let alone completely abandoned, in favor of the Bortz Study. Indeed, what is evident from the foregoing review is that the previous decisionmakers found both the Nielsen Studies and the Bortz Study to have inherent limitations, but nonetheless, highly relevant to the determination of the relative marketplace value. This Panel has offered nothing in terms of "new evidence" to justify a wholesale departure from these previous conclusions. Accordingly, the Panel's conclusion to abandon Nielsen Studies and accept Bortz *in toto* is contrary to established precedent. *National Association of Broadcasters v. CRT*, 722 F.2d 922, 932 (D.C. Cir. 1985).

3. The Panel is precluded from wholly accepting the Bortz Study in this proceeding.

The same conceptual limitations identified in past proceedings regarding the Bortz Study – including the short duration of the telephone interviews, the attitudinal nature of the study, and its failure to consider the supply side – exist in the instant proceeding. Panel Report at 19. The Panel's attempt to downplay these limitations so as to make its full acceptance of the Bortz Study more palatable is unavailing. Indeed, eliminating the limitations would require dramatic changes to the conceptual (surveying attitude and supply side) and executional (short interview duration) elements of the Bortz Study. No such dramatic changes occurred. Furthermore, the limitations inherent in the Bortz Study have been vigorously debated and defended for about two decades with the same result – the CARP or Tribunal refusing to wholly endorse the Bortz Study. Nothing in this record supports a change in those well-founded conclusions that the Bortz Study is inherently limited.

a. Short duration of interviews.

Undeterred by binding precedent, the Panel offered the conclusory assertion that the short duration of the Bortz telephone interviews does not "seriously jeopardize[ ] the integrity of the Bortz Survey results." Panel Report at 20. Indeed, the Panel sees no basis for adjusting any claimant's share on the basis of this executional flaw. *Id.* To reach this erroneous conclusion, the Panel relied principally on statements made by JSC witnesses Trautman, Egan,[7] Crandall and Allen and PTV witness Fuller, all of whom, in sum, assert that the respondents' general experience and familiarity with program services in the cable industry compensate for an otherwise inadequate length of time given to the respondent to recap unique CARP program categories across multiple signals. *Id.* at 19-20. This explanation was untenable in past proceedings, and remains so in the instant proceeding. *See, e.g.* 57 Fed. Reg. 12809.

b. Attitudinal nature of survey.

To circumvent what has been the most poignant criticism of the Bortz Study over the years – that it surveys attitudes, not conduct – the Panel offered paragraphs 41-44 of JSC's proposed findings of fact (which the Panel characterizes as "uncontroverted testimony") that purportedly "indicate[s] rather conclusively that constant sum methodology, as utilized in the Bortz survey, is highly predictive of actual marketplace behavior." Panel Report at 21.[8] Except for the statements of two witnesses, virtually all of the so-called "uncontroverted testimony" in the referenced JSC proposed findings are attributed to witnesses in the 1989 CRT Proceeding and 1990-92 CARP Proceeding where the Tribunal and the CARP both found the attitudinal

[7] Mr. Egan's testimony, where he demonstrates an inability to accurately answer Bortz questions, is discussed *infra*.

[8] The Panel appears to use the phrase "constant sum" interchangeably with the phrase "attitudinal survey." The two are not one and the same. Constant sum refers to the total amount respondents were asked to allocate. Attitudinal survey refers to predicting future (or assessing past) conduct without actually engaging in that conduct, *i.e.*, hypothetically stating how one would spend money as opposed to actually spending money. *See* Tr. 3404.

nature of the Bortz Study to be an incurable limitation.[9] As to the statements attributed to Canadian witness, Dr. Ringold, (JSC PFFCL ¶¶ 41, 43), those statements address the constant sum methodology, not the extent to which a survey of attitudes, such as the Bortz Study, is a preferred or flawless conceptual method. Indeed, Dr. Ringold indicated some skepticism during questioning by the Panel about the validity of an attitudinal survey of multiple categories of programming across multiple signals. *See* Tr. 5926, 5987-88, 5694-95. And, as Program Suppliers demonstrated, Dr. Ringold's survey, a Bortz-like survey, but of substantially fewer signals, suffered from severely flawed responses. PS PFFCL at 132 (¶¶ 912-34). Finally, the statement attributed to NAB witness, Dr. Joskow, JSC PFFCL ¶ 44, is merely conclusory and not supported by any meaningful analysis.[10]

c. Lack of supply side perspective.

The Panel acknowledged the 1990-92 CARP's conclusion that the absence of a seller's perspective in the Bortz Study is a significant conceptual limitation. Panel Report at 22 (citing 1990-92 CARP Report at 65). Although the 1990-92 Panel deemed such a limitation sufficiently significant to preclude full acceptance of the Bortz Study (1990-92 CARP Report at 66), this Panel failed to make any adjustments to the 1998-99 Bortz Study results to account for this limitation. The Panel offered a plethora of unsound and conclusory statements to justify its decision.

First, the Panel's initial conclusion that the absence of the seller's side perspective does not materially undermine the use of the Bortz Study, *id.*, departs significantly from binding

[9] It is obviously arbitrary to rely on testimony from a prior proceeding that was discounted by the prior panel to support a current finding.

[10] Dr. Joskow's statements in general, command very little regard because of the limited nature of his expertise. By his own admission, Dr. Joskow has had no experience in the valuation of programming and in preparation of his testimony reviewed only materials favorable to NAB's positions. Tr. 9034-40. Therefore, he has no basis upon which to make a comparative judgment regarding viewing.

precedent. 1990-92 CARP Proceeding at 65. What's more, the Panel pointed to no new evidence or changed circumstance to justify such a departure. The 1990-92 CARP deemed the failure to account for the supply side a significant limitation because "[w]hile the operator may be willing to spend a certain amount of its budget for a given category of programming, the market supply may be at odds with what the operator is willing to spend." 1990-92 CARP Report at 65. Prior adjudications reached the same result. The 1989 Tribunal refused to fully embrace the Bortz Study results because of its failure to account for the supply (seller's) side. 1989 CRT Proceeding, 57 Fed. Reg. 15301. The 1983 Tribunal also took issue with the absence of the seller's side perspective and failed to wholly accept the Bortz Study results reasoning that free of such consideration, respondents may express a desire for more sports programming than is available. 1983 CRT Proceeding, 51 Fed. Reg. at 12811. Clearly, by not wholly embracing the Bortz Study, these past decisions found the utility of the survey to be greatly undermined by its failure to account for the seller's side. However, here, the Panel fails to point to any new evidence in the instant proceeding to support its reversal of prior adjudicated determinations.[11]

Second, having completely ignored all of the supply side evidence presented by Program Suppliers, the Panel's claims that the demand side would more likely drive the value of programming in an unregulated marketplace. The Panel's claim clearly contradicts the record. Further, the notion that respondents *probably* incorporated their understanding of the seller's side into their responses, Panel Report at 22, is rank speculation and not supported by any evidence in the record.

[11] The failure to account for the seller's side is a major conceptual flaw. Accordingly, there can be no precise mathematical calculation of its effect (nor is one required) on a claimant's share as the Panel suggest. Panel Report at 22. Notwithstanding this fact, the Panel is, like all predecessor decisionmakers were, obligated to make some adjustment to the shares since the study does not fully account for all perspectives as it should.

The record contains significant credible evidence of the behavior of actual buyers and sellers in an unregulated marketplace that is at odds with the results of the Panel's view of the Bortz Study, including: (1) evidence that cable operators paid higher licensing fees for higher rated cable networks; (2) evidence that higher rated networks received higher licensing fees; (3) evidence of the increased revenue for TBS which converted to a cable network from a distant signal; (4) evidence of the high license fees paid by both cable networks and broadcast networks for syndicated programs; (5) evidence that Program Suppliers' programs received the largest share of viewing both by households and by individual demographic groups; and (6) evidence of cable operators significant investments in infrastructure that would attract subscribers in the 18-49 demographic group, the same group that is highly valued by advertisers who rely on Nielsen viewing data. In the face of this evidence of actual cable operator marketplace behavior that is at odds with the Bortz Study results, it is specious to suggest that the survey respondents can adequately account for the marketplace value.

d. Miscategorization of programs.

Previous decisions have fully recognized the limitations of the Bortz Study results because of the inability of cable system operators to accurately categorize particular programs to the Bortz-identified programming categories. *See*, 1990-92 CARP Decision at 66. Evidence that those imperfections have not been cured was provided by JSC witness Michael Egan. The Panel approvingly cited to Mr. Egan as support for numerous propositions, including that cable system operators are unconcerned with program viewing when valuing different program categories. As noted above, data from the cable network marketplace demonstrates Mr. Egan's testimony is flatly contradicted by the actual behavior of the cable system operators. More important, however, was Mr. Egan's testimony about the Bortz Study itself. Mr. Egan testified that while he could not remember specifically whether he answered a Bortz Study survey in the past, it was

entirely possible, in his position as a cable system executive, that he did. Egan Tr. 1334. He also testified, and the Panel found, that cable system operators "would have the ability to respond fully and accurately to the Bortz survey without advance preparation." Panel Report at 20. However, at the conclusion of Mr. Egan's testimony, he was asked to categorize certain types of programming to the Bortz Study categories that are assigned values by cable operators under the Bortz Study. Importantly, these questions were asked not by a party to the proceeding but by Judge Young of the Panel.

> JUDGE YOUNG: You were answering some questions about the Bortz survey earlier. If you remember, and I don't necessarily want you to look at it, but if you remember, if -- I guess you said you didn't remember specifically answering the Bortz survey?
>
> THE WITNESS: No.
>
> JUDGE YOUNG: Then it may be somewhat hypothetical. If you were a program executive and asked to respond to the Bortz survey, and if you were told that one of the categories was local news and public affairs, in your mind, how would you sort of categorize that or what would you put within that?
>
> THE WITNESS: What programming would I put in there?
>
> JUDGE YOUNG: What type of programming?
>
> THE WITNESS: Their nightly news would be what I would think of. Their 6 o'clock, 11 o'clock news.
>
> JUDGE YOUNG: If you were given those five or six categories as the Bortz survey reflects, in your mind what would you do if you were thinking about programming such as children's entertainment programming. Where would you put that?
>
> THE WITNESS: Children's entertainment programming. I would think of it, when phrased that way as programming on a broadcast television station, a commercial broadcast television station, probably.
>
> JUDGE YOUNG: But the categories are local news and public affairs or syndicated programming.
>
> THE WITNESS: Where would I put that then?
>
> JUDGE YOUNG: Yes.

> THE WITNESS: You know, it would make me pause and think like I'm doing now and I would think of that particular market because I know the signals that they're asking me about because they've told them to me and I would try and think, okay, are we talking about a station that's producing its own programming or are we talking about a station that's carrying some syndicated children's show and then I would just try and place it in the one that I thought. So I don't have one answer. I would try and do that exercise.
>
> JUDGE YOUNG: How about the post game sports interview programs that Mr. Stewart --
>
> THE WITNESS: Where would I put that? I'd throw that in sports.
>
> JUDGE YOUNG: And what about sort of news magazine type programs?
>
> THE WITNESS: Public Affairs. News and public affairs.
>
> JUDGE YOUNG: Okay, thank you.

The first answer given by Mr. Egan is probably correct, the second is an acknowledgment of an inability to answer the question and the third and fourth are likely wrong. Mr. Egan incorrectly credited the post-sports game interview to the Sports category. In reality, the post-sports game interview is generally station-produced and therefore belongs in the news and public affairs (NAB) category. Mr. Egan was also asked to categorize the "news magazine." National news magazine programs like *Entertainment Tonight*, or *Inside Edition*, and similar programming are syndicated programming and should be categorized as such. PS PFFCL at 12-13 (¶¶ 81-82). Only a local news magazine program would appropriately be categorized in news and public affairs.

As the foregoing illustrates, it is likely that the cable system operator asked Bortz-type questions on the stand in this Proceeding miscategorized at least half of the programming about which he was asked – to the extent he could answer the questions at all. If the Bortz Study is the "extremely robust" (Panel Report at 31) evidence upon which this Panel relied, one wouldn't expect such problematic results. At the very least, it was incumbent on the Panel to explain why

such continuing errors do not matter. Anything less is patently arbitrary. *Universal Camera Corp.*, 340 U.S. at 488.

4. Longstanding precedent precludes the Panel from ignoring the Nielsen Studies.

It is demonstrably clear from the decisions of the prior CRTs and CARP that viewing evidence, particularly Nielsen Studies and the accompanying supporting economic data, are a major part of the determination of the value of programming. Rather than respect precedent, this Panel completely abandoned reliance on the Nielsen Studies and accompanying economic analysis. Because it provided no reasoned analysis for doing so, this wholesale abandonment is arbitrary. *See Motor Vehicle Mfrs. Ass'n et al. v. State Farm Mutual*, 463 U.S. 29, 77 L.Ed.2d 443, 103 S.Ct. 2856 (1983)("A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.' Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.") (internal citations omitted).

To begin with, at several points in the Panel Report, the Panel seemed to place inordinate reliance on the fact that the Nielsen Studies results need to be adjusted to reflect marketplace value. Panel Report at 34. As noted above, this fairly unremarkable proposition has been included in every decision heretofore rendered in these proceedings. The Panel's statement that Program Suppliers conceded, for the first time that "without a means of translating viewing shares to value, the study does not afford an independent basis for determining relative value," Panel Report at 44, was actually an argument advanced by the litigants before the Panel. Had the Panel bothered to test that argument rather than blindly accept it, the argument would have been

discovered to be false. *See e.g.* 1990-92 CARP Report at 39 ("significantly, Program Suppliers do not argue that this Panel's allocation should match precisely the Nielsen figures. Rather, their position is that while viewing is not the only factor,...it appears to be a very important factor closely connected with value."); *Id.* at 43 ("Program Suppliers acknowledge that the Nielsen Study does not measure value; rather, it measures tuning. Program Suppliers point out they did not ask Nielsen to interpret what the results meant, but left that to the other witnesses and the evidence. Program Suppliers agree that the Nielsen figures are not the sole determinant of market value."). Blind acceptance of a party's statement in argument in the face of contradictory evidence constitutes abitrary decisionmaking. *Universal Camera Corp.*, 340 U.S. at 488. Indeed, it is the accompanying economic and other analyses that Program Suppliers have always relied upon to validate and corroborate the Nielsen Studies. Thus, the Panel's "eureka!" in justifying a wholesale abandonment of viewing evidence appears actually to have been fool's gold.

Next, the Panel rejected the notion that the 18-49 demographic group is the principal demographic group that drives the value of programming, and then disagreed with the "avidity" adjustment proposed by Program Suppliers witness, television industry economist, Dr. Arthur Gruen.[12] However, even if the Panel were correct in dismissing evidence concerning the 18-49 demographic group and the avidity adjustment proposed by Dr. Gruen, the Panel provides no credible justification for abandoning, wholesale, all evidence of program viewing.

a. 18-49 viewing.

The Panel incorrectly dismissed Dr. Gruen's evidence concerning the 18-49 demographic group. For the first time in cable distribution proceedings, Nielsen provided data of household

[12] Dr. Gruen remains the expert in this proceeding that has most directly worked in the areas of program valuation, economics and statistics. Gruen W.D.T. at Schedule 1.

viewing and of viewing by demographic groups, both of which showed overwhelmingly more viewing for Program Suppliers' programs than any other category.[13] PS PFFCL ¶ 242-45. To corroborate this data and provide a closer-to-marketplace analysis, Dr. Gruen took the Nielsen Studies data a step further. Dr. Gruen first established that 18-49 viewing tracked household viewing and that it even more closely tracked the way advertisers spend their money. Dr. Gruen then established that the 18-49 demographic group was the group most likely to buy new ancillary and digital services offered by cable system operators.[14] *Id.* ¶¶ 280, 364-72. Further, Dr. Gruen then established that during the 1998-99 period, cable system operators had, in fact, invested billions of dollars in infrastructure that would allow them to deliver these ancillary and digital services. *Id.* ¶¶ 351-61. According to Dr. Gruen, having invested billions of dollars in infrastructure that would allow them to deliver ancillary and digital services attractive to the 18-49 demographic group, it would make logical and economic sense for cable system operators to carry programming that is also attractive to that demographic group. *Id.* ¶ 372.

The Panel disagreed with Dr. Gruen's testimony regarding the 18-49 demographic claiming that there was no statistical basis for Dr. Gruen's assertion. Panel Report at 39. To justify this conclusion, the Panel relied on the testimony of PTV witness, Dr. Fairley. Dr. Fairley claimed that Dr. Gruen's assertion was incorrect because there is no statistically significant difference between the differential for average license fees per household for cable networks ranked by advertising and the comparable differential for cable network license fees ranked by total day ratings. Panel Report at 39. The CARP gravely misunderstood Dr. Gruen's testimony because Dr. Gruen specifically stated in his direct testimony that programs with a large number

[13] This was a constructive improvement in the Nielsen Studies as it presented viewing data as frequently reported and used in the marketplace. In addition, the presentation of demographic viewing allowed for analysis that more closely mirrors a marketplace perspective.

[14] Such services include digital cable, pay-per-view, local telephony, cable internet connections and similar services.

of 18-49 viewers are also likely to have a high level of household viewership, and vice versa. PS PFFCL ¶ 339. Dr. Fairley's calculations actually confirm Dr. Gruen's testimony that household ratings and the 18-49 ratings are not independent of each other but are in fact highly correlated. Given that both measures capture viewer behavior, it is certainly reasonable to select the one (18-49) that Dr. Gruen demonstrated more closely matches the way cable operators allocate their license fees. Thus, Dr. Fairley confirms Dr. Gruen's testimony that 18-49 viewing is determinate of cable operators' decsionmaking on license fee payments. In turn, the Panel accepted this proposition as well given their validation of Dr. Fairley's testimony. Accordingly, Dr. Gruen's conclusions on the use of 18-49 viewing as an allocation yardstick for copyright royalties was valid on all counts.

The Panel also disagreed with Dr. Gruen's assertion concerning the 18-49 demographic group because cable system operators are prohibited by law from selling advertising on distant signals and the Panel accepted the assertion that the focus on the 18-49 demographic was advertiser driven. Panel Report at 39. As an initial matter, the Panel's charge is to simulate a free marketplace. Indeed, the Panel recognized its task to "'simulate [relative] market valuation' as if no compulsory license existed." Panel Report at 10. Because cable operators are forbidden from selling advertising on distant signals as part of the compulsory license, if the compulsory license didn't exist, neither would the prohibition. The Panel stated that there is no "persuasive evidence" to suggest that cable operators would advertise on distant signals in the absence of the compulsory license. Panel Report at 13 n. 6. It is hard to imagine any more persuasive evidence than the removal of a statutory prohibition supported by the fact that cable operators began selling advertising on TBS once they were permitted to do so. Cable operators sell advertising

on many other cable networks and would similarly sell advertising on distant signals absent a statutory prohibition.[15]

The Panel also attacked Dr. Gruen's testimony on a conceptual basis stating that cable operators are interested in a broad array of programming that would appeal to a broad range of demographics within their franchise. In other words, cable operators' choices would reflect the interest of all members of the household not solely members of the household within the 18-49 year old demographic. Panel Report at 39-40. Again, this demonstrates the Panel's lack of understanding of Dr. Gruen's testimony. There is no argument that the cable system operators select a broad array of programming to appeal to a broad range of demographics. That selection is irrelevant to the issue before the Panel. The relevant issue here is the relative value of each category of programming carried on distant signals. Cable system operators have shown in the marketplace that they do want a broad array of programming, but that they place a greater value on programming appealing to the 18-49 demographic. PS PFFCL ¶ 317, 328, 346. The fact that cable system operators pay more for these programs is unquestionable proof of the relevance of the 18-49 demographic in allocating relative program values. *Id.* ¶ 375-77. That the Panel would ignore such evidence is arbitrary.

It is equally incorrect to suggest, as the Panel did, Panel Report at 40, that selecting distant signals on the basis that they would attract large viewing audiences in the 18-49 age

[15] Relatedly, the Panel incomprehensibly disqualified the experience of cable operators in valuing cable networks because they receive local advertisng. They chose to ignore Dr. Gruen's testimony on cross examination that even when local advertising is taken into account, cable operators still paid more for highly viewed networks, indicating that local advertising alone does not account for the greater value CSOs place on highly viewed cable networks. Tr. 7696. Moreover, the uncontroverted evidence in this proceeding established that cable operators receive, at most, five percent of their revenues from local advertising on cable networks. Tr. 7674-75. In one of the more bizarre inconsistencies in the Panel Report, the Panel concluded that a five percent number is large enough to disqualify the cable network experience in valuing distant signals, while a three percent number (revenue share from ancillary services) is too small to justify the 18-49 demographic as key in valuing distant signals, even though those ancillary revenues were projected to generate 50% of all incremental revenue increases to cable operators by the year 2002. Gruen W.R.T. at 18.

group could actually reduce the advertising revenues a cable system operator could earn. The Panel apparently believed that programming for the 18-49 demographic group on distant signals would draw audiences away from cable networks which would in turn affect the attractiveness of the cable networks to advertisers. *Id.* This notion is without foundation in the record and simply wrong analytically. The Panel relied principally on the testimony of Dr. Ducey for this proposition. Indeed, other than his mere conclusory statements, Dr. Ducey, who is not an economist, provided no evidence whatsoever about this presumed shift in advertising dollars. More significantly, the actual marketplace behavior of cable operators contradicts this proposition. Cable operators carry numerous cable networks on both analog and digital tiers, while selling little or no advertising on most of those niche networks. If cable operators really behaved as Dr. Ducey speculated, they would not want to carry these niche networks in order to preserve their local advertising on the leading cable networks. The Panel's conclusion therefore is pure speculation and is unsupported by the record.

With respect to the contention that 18-49 ratings do not reflect household viewing, Dr. Fairley, in fact, demonstrated the opposite. There cannot be a high correlation (statistically insignificant difference) between the advertiser ranking (the proxy for 18-49) and household ranking if the 18-49 ranking did not reflect the interests of all residents of a household. The Panel's flawed understanding of the statistical evidence leads it to rely on Dr. Fairley's analysis for its conclusions on relative value when in fact Dr. Fairley contravenes these conclusions.

It is irreconcilable for the Panel to both accept Dr. Fairley's analysis (correlation of household and 18-49 viewing) while at the same time rejecting the view that the interests of the 18-49 demographic group serve the economic interest of the cable system operators. If household and 18-49 ratings are highly correlated (in fact, statistically related), 18-49 cannot

possibly ignore a significant portion of the market. Consequently, it is incorrect to claim that the 18-49 demographic group ignores other viewers.[16]

In the real world, all programs are viewed by people of all ages. Therefore, a program with a high 18-49 rating also reaches many other age groups. Dr. Fairley's analysis simply confirms this fact. The 18-49 demographic group in effect subsumes the value of all viewers in the same manner that marketplace value subsumes those viewers. And, as Dr. Gruen demonstrated, cable system operators also do the same.

The evidence of marketplace carriage in no way demonstrates that other subscribers are ignored by focusing on 18-49 subscribers. Again, the Panel failed to distinguish between the decision to carry a service and the value of that service, implicitly assuming that all services carried are of equal value. That premise cannot be reconciled with the fact that in the real world (based on Dr. Gruen's testimony of actual behavior discussed below), cable system operators pay more for programming that targets 18-49 year olds than they do for other programming. That does not mean that other programming has no value, only that 18-49 programming has more value. If the Panel followed the logical extension of its views, it also should have concluded that cable system operators act irrationally and not in their economic interest.[17]

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[16] Alternatively, since the Panel did not quibble with the 2+ demographic data (i.e., the data combining all demographic groups), and if the Panel believed that the 2+ viewing was the appropriate demographic to simulate marketplace value, then it should have followed through and applied it. If the Panel did so, the 2+ cohort would give Program Suppliers a 59 percent share.

[17] The Panel seems to place some importance on JSC witness Allen's contention that cable system operators have no interest in what their subscribers watch so long as the subscribers continue to write their subscription check. 1998-99 CARP Report at 41. However, as the 1990-92 CARP stated, it is disingenuous to suggest that cable operators care to attract subscribers but do not care about whether or not those subscribers are satisfied by the content.

The Panel's selective discussion and presentation of data from the Beta Research Study of cable subscription (Beta Research Study)[18] sponsored by NAB witness, Dr. Ducey, is grossly misleading.[19] Dr. Ducey presented only the market research on the relative importance of subscriber behavior within specific age cohorts, rather than in the total marketplace. When examined properly in the context of the total marketplace, the results confirm rather than refute the importance of the 18-49 age group. PS PFFCL ¶¶ 764-65. Thus, approximately 69% of *all* cable subscribers that are aware of the emerging networks fall within the 18-49 demographic group. Sixty-eight percent (68%) of *all* cable subscribers who would definitely or probably subscribe to a digital tier of cable programming fall in the 18-49 demographic group. Seventy-two percent (72%) of *all* cable subscribers extremely, very or fairly interested in the satellite dish television service programming services are within the 18-49 group. Seventy-nine percent (79%) of *all* subscribers that are extremely or very interested in high speed Internet are within the 18-49 demographic group. PS PFFCL at 114 (p. 772). Clearly, most of the total marketplace interest in the ancillary services offered by the cable operators comes from the 18-49 group. Thus, despite the Panel's erroneous selection of Dr. Ducey's irrelevant statistics, the Beta Research Study's evidence, when properly interpreted, confirms Dr. Gruen's testimony that cable system operators are overwhelmingly interested in subscribers within the 18-49 demographic group. A well-established litmus test for arbitrary decisionmaking is the selective citation of record evidence to support the agency decision. *Universal Camera Corp.*, 340 U.S. at 488.

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[18] The Beta Research Study relied on by NAB ignores persons within to the 2-17 demographic group. PS PFFCL ¶ 767.

[19] It is important to note, that despite Dr. Richard V. Ducey's role in this proceeding as an introductory witness who only provided general information about the cable industry and conducted no studies, the Panel relied on him seventeen (17) times in the Report. Panel Report at 30, 38, 39, 40 (3 times), 43 (twice), 44, 51, 66, 87. Moreover, the Panel did not address a single criticism of Dr. Ducey's qualifications as a witness, despite his admission that his only experience with programming on cable television was for eight months in his first job out of college in 1978,

The Panel's reliance (Panel Report at 41) again on Dr. Ducey's supposition, that low revenue shares from ancillary services signified that delivery those services was not a driving consideration for cable operators, ignores the marketplace reality during the relevant period. Cable system operators had spent billions to upgrade their systems to provide these ancillary services they had just introduced. PS PFFCL at 74-75 (¶ 494-500). Although comprising a small percentage of their revenues at that time, given the significant investments in infrastructure, cable systems viewed these ancillary services as the principal driver of revenue growth in the coming years. Their traditional revenues streams were slowing due to overall market saturation of cable/satellite and the expected loss of subscribers to DBS. *Id.* at 74 (¶ 494). Thus, cable systems placed much more importance on those ancillary services than their revenue share would indicate. That they did so was logical based on the large investments that had been made.

b. Dr. Gruen's avidity adjustments are valid.

The Panel makes much of the fact that in adjusting viewing to take into consideration program popularity or "avidity," Dr. Gruen (a) compared quarter hours to minutes, and (b) did not weight the program minutes to account for penetration of the various signals. Panel Report at 43. Neither alleged problem affects Dr. Gruen's testimony. One of the problems, the relationship of quarter hours to minutes is easily rectified by simply multiplying quarter hours times 15. The Panel could have performed that calculation and in fact Dr. Gruen performed it at the Panel's request and reported his results in his rebuttal testimony. Gruen W.R.T. at 35-46. Hence, the first problem identified went away and why it was discussed in detail by the Panel is

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and that he has had no recent meaningful or relevant experience with evaluation of programs, cable subscriber behavior or cable subscriber attitudes. PS PFFCL ¶¶ 726-29.

a mystery. The second problem, the fact that the quarter hours were not weighted by subscribers was demonstrated to be a distinction without a difference.

As the argument went, certain cable signals are available in more homes than others. When Nielsen reports quarter hours of programming (as opposed to actual viewing minutes), it reports programming per signal not per subscriber. PS PFFCL ¶ 384. Therefore, the availability of the programming to more people is not taken into consideration in the Nielsen programming minutes. When NAB and PTV raised this issue, it was unclear if the fact that the programming minutes were not weighted by subscribers would have any impact on the adjustments testified to by Dr. Gruen. Despite this fact, the Panel determined the adjustments to be unwarranted principally because of this lack of weighting.[20] See Panel Report at 43. In its Proposed Findings of Facts and Conclusions of Law, Program Suppliers used weighted program minutes that were in the record and sponsored by NAB witnesses, Dr. Fratrik and Dr. Rosston to perform the precise same calculation that Dr. Gruen had performed.[21] That calculation showed that weighting the program minutes by subscribers actually altered the calculation very little and did so in a way that actually increased the share attributable to the Program Suppliers and decreased

[20] This finding by the Panel and acceptance of the criticism cannot be reconciled with the standards set by the Panel early in the proceeding. By order dated June 4, 2003, the Panel required that all parties criticizing evidence demonstrate that the criticism had a quantifiable effect. NAB's criticism of Dr. Gruen's use of unweighted subscriber minutes was not demonstrated to be meaningful by NAB, yet it was accepted by the Panel. Indeed, Program Suppliers demonstrated that the criticism was meaningless using NAB's own data. This further demonstrates that the Panel not only ignored relevant evidence but also ignored previously announced evidentiary standards in reaching the results it did.

[21] The Panel apparently failed to accept the calculations demonstrating that criticism was unfounded because there was no "sponsoring witness." However, both sets of data were already in the record and the comparison simply involved dividing one number by another – not exactly "higher math." In any event, the Panel's conclusion is not supported by a citation to any rule or precedent requiring a sponsoring witness for mere calculations. As is the case in matters in federal court, the parties may use any evidence in the record for illustrative purposes. *See United States v. Nivica*, 887 F.2d 1110, 1126 (1st Cir. 1989); *United States v. Loney*, 959 F.2d 1332, 1341 (5th Cir. 1992). *See also* Fed. R. Evid. 1006 and 402. It seems implausible that the Panel would apply a stricter evidentiary standard in this proceeding than what applies in federal court. Doing so could well be additional evidence of arbitrary decisionmaking, especially since the evidence was used to rebut an inference of unreliability, not for substantive purposes.

the shares attributable to both NAB and PTV, the complaining parties.[22] Accordingly, the suspected problem did not exist at all and if there was a problem it was that Program Suppliers' share was understated as opposed to overstated. NAB again tried in vain in its Reply Proposed Findings of Facts and Conclusions of Law to discredit the calculation, but did nothing more than substitute 2+ program minutes for 18-49 program minutes to come up with a different result. See PS Demo Exhibit 28 (demonstrating that the sole effect of NAB's recalculation in its Reply PFFCL came from the substitution of 2+ viewing data for 18-49 viewing data). Despite the fact that the criticism of Dr. Gruen's adjustments was nothing more than background noise, the Panel appears to have accepted that criticism to such a degree that it discounted Dr. Gruen's adjustments entirely.[23] Panel Report at 43. Program Suppliers established that the criticism of Dr. Gruen's adjustments, if it made any difference at all, actually helped Program Suppliers and harmed those criticizing.

Accordingly, it was arbitrary for the Panel to disregard Dr. Gruen's reliance on 18-49 viewing as the appropriate viewing metric and to disregard his adjustments.

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[22] The Panel's characterization that Program Suppliers "recognized the flaw" is obviously inaccurate. Program Suppliers, far from recognizing a flaw, demonstrated that the presumed flaw did not exist.

[23] In reaching its conclusion the Panel relied on the rebuttal testimony of Dr. Ducey and calculations he offered. Panel Report at 44. NAB Exhibit 17-R. However, Dr. Ducey testified that he had no role in the preparation of the calculations that were included in NAB Exhibit 18-R and that Exhibit was stricken by the Panel because the data and conclusions contained thereon were inadmissible under the CARP rules. Exhibit 17-R, on which the Panel ultimately relied, contains inadmissible data derived from stricken NAB Exhibit 18-R. Program Suppliers alerted the Panel to the inclusion of inadmissible material in NAB Exhibit 17-R in its Proposed Findings of Fact and Conclusions of Law at p. 114 and Tr. 10912. Accordingly, the Panel relied on data it knew was inadmissible to support its conclusions. Conversely, as discussed in Note 21 above, the Panel refused to accept calculations made using evidence properly in the record. Accordingly, the Panel relied on that which it knew was unsupported as opposed to the record evidence. The fact that NAB refused to use the weighted program minutes already in the record to challenge Dr. Gruen's calculations and instead proposed an entirely different set of unsupported weighted program minutes at the eleventh hour should have been a red flag. Instead, the Panel condoned NAB's ruse.

c. The Panel had no basis for wholesale abandonment of Nielsen.

Even if the Panel disagreed with Dr. Gruen's testimony regarding the value of the 18-49 demographic group, and even if the Panel disagreed with Dr. Gruen's avidity adjustment, the Panel provided no legal basis for complete abandonment of Nielsen viewing data. As demonstrated, the Nielsen studies have always been considered not merely as evidence of actual conduct but also critical to the determination of the value of programming. The Panel concedes that unlike in past proceedings, Nielsen studies offered in this proceeding contain no serious methodological flaws. Program Suppliers presented two witnesses from Nielsen who provided detailed, sophisticated, and complex explanations, not only of the conceptual basis for the Nielsen study but also for the process that yielded the study results. No party in this proceeding seriously challenged the Nielsen results. Program categorization and non-response rates, which parties had challenged in prior proceedings, went unchallenged in this proceeding. In addition, in response to criticisms from past proceedings and in an attempt to better comport with Nielsen data that is used in the marketplace, Program Suppliers presented not simply household viewing but also a breakdown of viewing by demographic groups. In addition, Program Suppliers provided the quintile data to assure the Panel that a small number of heavy viewing homes do not unduly influence total viewing as some claimants had argued in the past. *See* PS PFFCL ¶¶ 205-276. In effect, the Nielsen Studies presented in the instant proceeding are by far the most sophisticated, the most accurate, and the most reliable Nielsen studies perhaps ever presented in this history of this proceeding. Rather than abandon these studies, the Panel should have instead placed heavier reliance on these studies by virtue of the vast improvements. The Panel, however, failed to do so in contravention of established precedent.

d. The Panel's stated rationale that the Bortz Study takes changed circumstances into account cannot be supported.

In its effort to support the wholesale abandonment of prior decisions and failure to engage in any sort of analysis of changed circumstances as to Program Suppliers – all the while reducing the Program Suppliers share by millions of dollars – the Panel stated that "changed circumstances are embedded within methodologies that provide reliable estimates of 1998 or 1999 relative valuations." Panel Report at 16. The Panel's position is flawed and demonstrates fundamental inconsistencies in its reasoning.

First, the Panel cites no support for its contention that the Bortz Study respondents analyze circumstances that may have changed in responding to the Bortz questions. Panel Report at 44, 45, 50-51. It is simply a conclusory assertion. The Panel points to no evidence in the record. The Panel's conclusory assertion could be easily tested by determining if there is a correlation between the Bortz Study results for various years and the actual changed circumstances. Second, if the conclusion is valid, it demonstrates that the Panel's analysis regarding Program Suppliers is wrong. Program Suppliers' Bortz share was roughly the same from 1990-92 to 1998-99. Trautman W.D.T. 6 (Table 1-2).[24] Therefore, according to the Panel's conclusions, evidence of changed circumstances demands that Program Suppliers share should have remained the same from the last proceeding. To award about 32% less in the face of an analysis that demonstrates no change is arbitrary.

[24] The Bortz results for the relevant years: movies 1990-92: 25.6-30.1; syndicated shows, series and specials: 1990-92: 14.5-16.0; movies 1998-99: 21.9-22.0; syndicated shows, series and specials: 1998-99: 15.8-17.8.

B. THE PANEL'S FAILURE TO DISCUSS AND ANALYZE THE EVIDENCE RENDERS ITS REPORT ARBITRARY.

In arriving at its decision, the Panel intentionally disregarded or overlooked substantial evidence that compelled a different conclusion than it reached. Rather than discuss and analyze this evidence or why it chose not to credit it, the Panel simply swept it under the rug:

> Accordingly, in this Report, the Panel attempts to articulate only the principal grounds upon which our determinations are based. Of course, in arriving at these determinations, the Panel has carefully reviewed and considered all of the parties' evidence and arguments. To the extent this Report comports with a particular contention of a party, we accept that contention. To the extent it does not, we reject that contention.

Panel Report at 7.

Agencies are precluded from engaging in such cavalier analyses with respect to the matters before them. A reviewing body must be able to assure itself that reasoned consideration of the relevant factors has, in fact, occurred. *Permian Basin Area Rate Cases,* 390 U.S. 747, 792, 88 S.Ct. 1344, 1373, 20 L.Ed. 312 (1968)(noting that the court's responsibility is to "assure itself that the Commission has given reasoned consideration to each of the pertinent factors."); *City of New York v. F.C.C.*, 814 F.2d 720, 728 (D.C. Cir. 1987)(noting that while an administrative agency has no obligation to consider every comment raised during a proceeding, "it must nevertheless consider all 'relevant factors.'"); *Motor Vehicle Mfrs. Ass'n et al. v. State Farm Mutual*, 463 U.S. 29, 77 L.Ed.2d 443, 103 S.Ct. 2856 (1983)(noting that an agency rule would be arbitrary if it failed to consider an important aspect of the problem).

By the Panel's own account, it "attempts to articulate only the principal grounds upon which our determinations are based." If its "report comports with a particular contention of a party," it explains, the reader can conclude that the panel has decided to "accept that contention." Panel Report at 7. As to evidence or conclusions that may contradict those of its findings and conclusions actually committed to writing, the Panel states only that addressing such evidence

and contentions is "neither necessary nor practicable within the time constraints imposed under 37 C.F.R. § 251.53(a)." Panel Report at 7. The Panel's self-description of its decisionmaking process is a definition of arbitrariness on its face for several reasons.

First, a decision is arbitrary if it is unsupported by substantial evidence. *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 338 (D.C. Cir 1985) (noting the interchangeability of the substantial evidence and arbitrary and capricious standard). While an administrative agency can rest its decision on any probative evidence, including hearsay, it must take into account the record as a whole, including any evidence that fairly detracts from the evidence relied upon. *Universal Camera Corp.*, 340 U.S. at 488. A statement that the Panel has considered all the evidence, without an articulation in the order itself of the reasons for rejecting material evidence, is insufficient to meet this obligation. In other words, rejection of parties' principal arguments *sub silentio* is plainly unacceptable. The "time constraints" facing the Panel, moreover, do not relieve it of this obligation. *See id.*

Second, and related, while an administrative agency is not required to address each and every argument, the Panel's protestations notwithstanding, reasoned decisionmaking does require it to "consider *all* relevant factors," not simply those the Panel has identified as "the principal grounds" for the Panel's decision. *City of New York v. F.C.C.*, 814 F.2d at 728. Indeed, it is an essential element of reasoned decisionmaking that the Panel "engage the arguments before it." *NorAm Gas Transmission Co.*, 148 F.3d at 1165. This Panel failed to engage many of the arguments before it and therefore acted arbitrarily.

1. The specific evidence ignored by the Panel compels a different result than the one reached by the Panel.

The Panel's wholesale failure to evaluate alternative theories and evidence requires rejection of the entire report. In addition to this fundamental failure, the evidence ignored by the

Panel was of such a nature that had it been evaluated, understood, and given the weight it deserved, an entirely different result would have been reached. Below, Program Suppliers identify the major evidentiary matters ignored by the Panel and discuss the impact of that evidence on the Panel's decision.

a. Evidence of marketplace value.

At the outset of its report, the Panel embraced the notion that its "primary objective is to 'simulate [relative] market valuation' as if no compulsory license existed." Panel Report at 10. Remarkably, after acknowledging the appropriate standard, the Panel ignored all evidence of actual relevant marketplace value of the various programming categories. Furthermore, the evidence the Panel chose to rely on was contained in the studies that presumed that the compulsory license continued to exist. Accordingly, the Panel ignored relevant evidence and relied on evidence that was contrary to the stated standard. Failing to adhere to the appropriate standard, even if it is correctly identified, leads to arbitrary decisionmaking.[25]

Indeed, the Panel stated, in justifying its reliance on Bortz, "until the behavior of actual buyers and sellers in an unregulated marketplace can be directly observed, the Bortz Study remains a highly valuable tool...." Panel Report at 22. It cannot be seriously questioned that if the compulsory license was suddenly abolished and cable operators were free to negotiate for the carriage of distant signals that such negotiation would look nearly identical to the current cable network marketplace. 1990-92 CARP Report at 24; PS PFFCL at 45 (¶285). Given the obvious relationship, how cable operators allocate their funds to purchase cable network programming

[25] The two methodologies the Panel accepted, Bortz and Rosston, both attempt to arrive at a marketplace value in a market in which the compulsory license does exist. Accordingly, both methodologies fail the standard established by the Panel.

would clearly be relevant and predictive of how they would allocate their funds to distant signals in an unregulated environment.

Program Suppliers presented data from industry sources that detailed how cable system operators used their funds to acquire programming from cable networks.[26] The evidence presented compared the license fees paid by cable operators in actual marketplace transactions for cable networks for which data was available and the Nielsen household ratings for those cable networks. Program Suppliers' witness, Dr. Arthur Gruen, analyzed whether there was a correlation between household viewing and the amount paid by cable operators in license fees for programming. The evidence showed that there was a clear and discernible correlation between the household ratings and amounts paid. Below are the tables developed by Dr. Gruen with the averages calculated.

License Fees and Total Day Ratings

	Prime Time Ratings			*License Fees Per HH*		
Category	*1998*	*1999*	*Avg.*	*1998*	*1999*	*Avg.*
Top 11 Rated Networks	0.92	0.93	0.93	3.46	3.77	3.61
Middle 11 Rated Networks	0.44	0.45	0.44	1.31	1.36	1.34
Bottom 10 Rated Networks	0.23	0.26	0.24	0.75	0.85	0.80

Gruen W.D.T. at 12; *see also* PS PFFCL at 52 (¶¶ 331-35).

First, there is a direct relationship between viewing levels to cable networks and what those networks charge CSOs in license fees. No evidence showed that the distant signal market, if it existed, would behave any differently and there is no reason to think that it would. Second, while the underlying license fee data corroborates the Bortz Study to the extent that cable operators highly value sports programming, Gruen W.D.T. at 41, it contradicts the Bortz Study and numerous witnesses that concluded that cable operators cared little, if any, about what

[26] It should not be overlooked that the evidence offered by Program Suppliers on this point was simply data reported from parties independent from this proceeding. As such, the Panel ignored objective industry data in favor of studies or reports prepared by litigants for the sole purpose of this proceeding.

subscribers watch. If that was really true, why would CSOs pay more to obtain the programming that their subscribers watch? The actual evidence of cable operator behavior showed that they paid more to obtain that programming. In the face of this empirical, objective, uncontroverted data it was wrong for the Panel to conclude, as it did, that cable operators cared little about viewing. *See* Panel Report at 38 (citing testimony of witness claims that cable operators don't care about viewing as long as subscriber continues to subscribe). That conclusion is not rational in the face of objective data demonstrating that its falsity.

As noted, the Panel failed to identify, discuss, or evaluate this evidence. By ignoring this evidence, this Panel determined that the most compelling evidence of actual marketplace behavior – the viewing-centric value demonstrated by cable systems – is not even worth mentioning. Obviously, such a decision to eschew such compelling real world evidence can only be based on thoughtful, well-reasoned analysis as to why that evidence should be disregarded. This Panel failed to provide such an analysis and, as such, engaged in arbitrary decisionmaking.

Importantly, every economist that testified before the Panel on the issue clearly and unequivocally stated that evidence of actual transactions or actual data is preferable to survey evidence. *See e.g.*, Crandall on behalf of JSC, Tr. at 648 ("there is no doubt that a survey is a somewhat imprecise measure of how a market would actually work out. It would be nice to have actual market transactions."); Johnson on behalf of PTV, Tr. at 3725; ("economists would say as a general rule that they greatly prefer the use of behavioral measures because these measures take into account the way the world actually works..."); Gruen Tr. 7669. PS PFFCL ¶ 870, and ¶ 503 generally. *See also* 1990-92 CARP Report at 66; 1983 CRT Proceeding 51 Fed. Reg. at 12808-09. Here, the Panel ignored the evidence of actual market transactions without comment or justification in favor of the "imprecise measure." That is arbitrary on its face.

b. The Panel ignored evidence of the actual marketplace value of the programming being retransmitted.

In addition to evidence of how cable networks are valued in the marketplace, Program Suppliers presented further empirical evidence of the actual value of some of the programming appearing on distant signals in the markets in which it is actually licensed. Again, this evidence was comprised of records of actual marketplace transactions occurring in the relevant timeframe, not some opinion of value espoused by a litigant's hired witness. These data established the extraordinary amounts paid for popular syndicated programming in the late 1990s. Nine series entering television syndication in the relevant period, including programs such as *Seinfeld*, *Frasier,* and *Friends* generated average license fees of about $13 million per episode and a total of $3.4 billion in aggregate license fees. PS PFFCL ¶ 505. Cable networks were likewise active in licensing syndicated programs in the relevant timeframe, with total commitments of $1.8 billion. PS PFFCL ¶ 506. Again, this testimony was ignored by the Panel. No other program category, except JSC, presented any evidence concerning the actual marketplace value of the programming retransmitted. The Panel ignored this evidence despite the fact that it compelled the result that high relative marketplace value of Program Suppliers' programming in the non-compulsory license arena required a similar finding of a relatively high marketplace value of Program Suppliers programming in compulsory license proceedings.

c. The Panel ignored many of the Program Suppliers' witnesses.

In addition to ignoring compelling objective data put before it, the Panel also chose to ignore the testimony of most of Program Suppliers' witnesses, despite the fact that each presented detailed expert testimony as to why distant signal retransmitted programming should be principally valued, as it is in the rest of the television industry, on the basis of viewing of those programs. Indeed, Program Suppliers presented the testimony of 12 witnesses, spanning

about 9 hearing days. Of these, the Panel cited only five and, in reality, only discussed the testimony of one witness, Dr. Arthur Gruen. Of particular note, the Panel ignored the testimony of Professor Robert Thompson, the country's foremost and most widely quoted expert on popular culture and popular television. *See* PS PFFCL at 81-91 (¶¶ 549-627). Also, the Panel ignored the testimony of Professor Carl Carey, the former general manager of three of the largest broadcast television stations in the world. PS PFFCL at 21-26 (¶¶ 144-76). Both testified in a clear and compelling manner that television programming, in the real world, is valued nearly exclusively based on viewership. In addition, Professor Thompson corroborated Dr. Gruen's mathematically based avidity calculations with detailed evidence of the cultural significance and popularity of Program Suppliers' programming. Accordingly, both the objective data of marketplace transactions and direct testimony of television industry experts directly contradicted the Panel's conclusion, yet neither was discussed, evaluated or even mentioned. That is quintessential arbitrary decisionmaking. *Universal Camera Corp.*, 340 U.S. at 488 (failure to consider controverting evidence is arbitrary).

C. THE PANEL INAPPROPRIATELY RELIED ON THE WRONG VALUATION CRITERIA IN ATTEMPTING TO ARRIVE AT MARKETPLACE VALUE.

The Copyright Act and decisions construing it require that the Panel distribute copyright royalties by determining the relative marketplace value of retransmitted programming. The Panel acknowledged its task. Panel Report at 10.

At its heart, this matter involves the application of the principles of copyright law, in that owners of protected programming are compensated for the use to which that programming is put without their permission. PS PFFCL ¶¶ 4-5, 93. Accordingly, there is no better evidence of the use to which the programming is put than evidence concerning how many people view the

programming and the demographic makeup of those people. As noted above, every decision before has recognized this fundamental principle.

However, this basic principle seems to have been lost on this Panel. For example, the Panel seems to have credited the testimony of Dr. Joskow and others who testified about cable subscribers desiring "options." Indeed, the Panel suggested that certain cable subscribers subscribe solely to have access to the "big game" or important news events.[27] While both assertions could be true, the Copyright Act and cases construing its provisions do not direct the Panel to distribute cable royalties on the basis of perceived reasons for subscribing to cable service in general. Rather, the Copyright Act requires that the Panel distribute the royalties on the basis of the overall relative market value of the programs shown on distantly retransmitted over-the-air broadcast television signals.

The absurd results spawned by the Panel's focus on programming value only in terms of "attracting and retaining" subscribers can be illustrated by a couple of simple examples. To accept the Panel's premise, if in any given year in which there was no "big game" on a distantly retransmitted broadcast signal or the subscriber missed the game, but the subscriber watched a half hour's worth of *Seinfeld*, *Friends*, or *Frasier* episodes every weekday night on the same signals, the JSC would be entitled to 100% of the royalties attributable to that particular cable subscriber. Accordingly, the owner of the programming actually used by the subscriber would receive no compensation and the owner of the unused programming would receive all of the royalties. That result condones a distribution methodology that is at odds with the statutory plan. A similarly absurd result would occur if the "big game" was actually shown on ESPN, a cable

[27] The Panel seems to implicitly find that the broadcast networks are incapable of adequately covering a major news event or the "big game" so as to make cable required.

network, or on a broadcast signal as a network show,[28] but the only distant signal programming the subscriber watched was nonnetwork syndicated programming. Under the Panel's rationale, JSC would presumably be awarded 100% of the royalties despite the fact that there may have been no compensable JSC programming retransmitted. The requirements placed on the Panel pursuant to the Copyright Act simply do not allow this result. Accordingly, to the extent the CARP's decision is based on this incorrect definition of the marketplace valuation, it is contrary to the Copyright Act and must be modified or rejected.

D. NUMEROUS OTHER CONCLUSIONS REACHED BY THE PANEL ARE ARBITRARY AND REQUIRE REJECTION OR MODIFICATION OF THE REPORT BY THE LIBRARIAN.

In addition to the systemic infirmities in the Panel's process demonstrated above -- ignoring compelling record evidence and prior precedent – the Panel Report also cannot be sustained for a variety of specific reasons. Each of these is detailed below.

1. Inconsistent treatment of similarly situated claimants.

PTV and Canadian Claimants are similarly situated because their claims are based only on the programs shown on distantly retransmitted PTV and Canadian signals, respectively. Many parties advocated that PTV's share should simply be the fees paid by cable system operators to carry Public Television ("the fees gen approach"). All parties (except PTV) appear to have agreed that the Canadians' award should be fixed at the fees generated to carry Canadian signals apportioned by the amount of Canadian content carried on those signals. The Panel accepted the parties' argument concerning the Canadians but failed to accept it regarding PTV. It is axiomatic that federal agencies must act in an evenhanded manner when performing their duties. *Sharron Motor Lines, Inc. v. U.S.*, 633 F.2d 1115, 1116-17 (5th Cir. 1981)(noting that

[28] That is, carried by NBC, CBS or ABC.

"law does not permit an agency to grant one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."). The Panel provided no rational basis for accepting the methodology as to one claimant and rejecting it as to the other.

Instead, the Panel engaged in an analysis of changed circumstances regarding PTV and came to the conclusion that PTV's award should remain the same. Panel Report at 60, 65-69. The Panel's decision in this regard was arbitrary for at least two reasons. First, the very same reasons for adopting fees generation approach as to Canadians apply to PTV. PTV, like the Canadians, should receive the fees paid for the carriage of their signal and nothing more.

Second, the Panel's analysis of the changed circumstances relating to PTV suggests that whatever increased level of carriage occurred for PTV between 1992 and 1998 was the result of the reinstitution of "must carry" rules. *Id.* at 57, 67. Despite the Panel's acknowledgement that PTV's relative market value had declined, the conclusion reached with respect to PTV was simply that there was no evidence that circumstances had changed to either justify an increase or a decrease in its award from the prior proceeding. *Id.* at 67. Tellingly, it appears that the real reason the Panel decided to leave the PTV award unchanged was because, as it stated in a parenthetical on page 69 of the Report, the fees generation approach "has heretofore never been heavily relied upon to determine the PTV award." *Id.* at 69.

In PTV's case, new evidence was presented that demonstrated that PTV's relative value was not as high as any other claimant, i.e. that PTV's asserted "parity" was unfounded. The Panel accepted that evidence. Panel Report at 63-65. Because PTV's relative value could be shown to be less than other major claimants, it was demonstrated that PTV's award should not go beyond the fees paid for carriage of its signals. The Panel's refusal to find this evidence

substantial and controlling simply because a similar but unsubstantiated argument had not been accepted in the past was arbitrary. PTV's share should be modified and reduced to the fees paid for its carriage. *See* PS PFFCL at 218-19.

2. *The Panel failed to articulate facts and conclusions that justify a near doubling of NAB's award from the last litigated proceeding.*

In 1990-92, the last litigated proceeding, NAB received a 7.3% share of the royalty pool. NAB's share nearly doubled in this proceeding. Panel Report at 92-93.[29] In its discussion of NAB's award, the Panel cited the Bortz Study, Nielsen Studies, Dr. Rosston's regression analysis, and the "clustering" study as support for the increase. Panel Report at 50-51. But the Panel provided no rational basis upon which to justify such a drastic change from the previous award.

As support for its conclusion, the Panel relied on Bortz Study results that clearly do not demonstrate that the value of NAB programming doubled since 1990-92. The Panel stated, "[c]learly the most important development affecting NAB is the *increase in its Bortz share from 1990-92 to 1998-99.*" Panel Report at 51 (citing Trautman W.D.T. JSC Exhibit 1 at 26 (Table IV-1); Tr. 318-21. However, the Panel's conclusion cannot be derived from the evidence it relied on in fixing NAB's award.

The pertinent JSC exhibit is reproduced below:

[29] 1998: 13.96836% of Basic, 15.34209% of 3.75% Fund; 1999: 13.77736% of Basic, 15.12731% of 3.75%.

Bortz Survey Results

Cable Operator Survey Year	Value Allocated to News and Public Affairs
1990	11.9
1991	14.8
1992	12.4
1993	12.6
1994	11.2
1995	10.8
1996	16.4
1997	14.3
1998	14.8
1999	14.7

NAB excerpt from: Trautman W.D.T. JSC Exhibit 1 at 26 (Table IV-1)

As is evident from the exhibit, the Bortz Study gave NAB programming practically the same valuation estimate in 1991 as it did in 1998 and 1999, and the results for all of the years are in a very narrow range, probably all within the confidence levels of the various studies. As noted above, it is incumbent on the Panel to establish a rational basis for the choices it made. *Nat'l Ass'n of Broadcasters*, 146 F.3d at 923. The Bortz Study results provide no rational basis for the doubling of NAB's award. Therefore, the decision is arbitrary.

The Panel also relied on the "clustering" study in support of it's dramatic increase in NAB's share. Panel Report at 51. The Panel cited testimony that, "the percentage of Form 3 instances of carriage within 150 miles of the home city of the station being carried rose to 89.2% in 1998 and 1999. This was up from 87.6% in 1992 and 86.5% in 1989." *Id.* (citing Ducey W.D.T. at 13-14). Again, the increase in clustered carriage of 1.8% in the relevant timeframe cannot provide a rational basis for a 100% increase in award. Not only is the percentage increase negligible, the Panel ignored evidence that this study did not incorporate data from the superstations which dominate instances of distant signal carriage. Moreover, it glossed over the

fact that no testimony was adduced to indicate that clustering was in any way a result of NAB programming. PS PFFCL ¶¶ 714-17.

That the Panel relied on the Nielsen viewing data to justify increasing NAB's share but ignored viewing when making other parties' allocations is unexplained discrimination between similarly situated parties. The Panel earlier stated that the Nielsen study "cannot be used to measure directly relative value to CSOs." Panel Report at 38. Yet, it conveniently cited the Nielsen study when it attempted to justify an otherwise implausible increase to NAB's award. This discrimination between the parties for no apparent reason is not explained or justified and is therefore arbitrary.

Finally, the Panel's failure to consider evidence that the proliferation of news sources diminished the value of local news programming adds to the implausibility of the NAB award. In this proceeding, multiple reports, articles, and studies (written and conducted for purposes unrelated to this proceeding) demonstrated viewers' increased access to alternative news sources, like the internet and CNN, made NAB's main programming element, local news, less valuable. PS PFFCL ¶¶ 705-06. Further, the Panel made no findings regarding evidence that local news is recycled, shared among stations, and becoming preempted by regional and national news networks, all points that address the decreasing value of NAB programming. *See* PS PFFCL ¶¶ 703-04. By not addressing this evidence, the Panel failed to fairly confront the evidence offered that was contrary to its conclusion. *Universal Camera Corp.*, 340 U.S. at 488; *NorAm Gas Transmission Co.*, 148 F.3d at 1165.

3. *Given the flaws inherent in Rosston's regression analysis the Panel failed to plausibly explain why it can be used as corroborative evidence.*

The Panel identified the volatility, variability, and limited explanatory power of Dr. Rosston's regression analysis in refusing to find the analysis a useful tool in determining the relative market value of programming. Panel Report at 48-49. That Dr. Rosston's analysis is flawed is an understatement.[30] Program Suppliers detailed statistical and economic flaws inherent in Dr. Rosston's analysis so severe as to make it wholly unacceptable. PS PFFCL 66-67 (¶¶ 439-41); 69-73 (¶¶ 455-86), 91-96 (¶¶ 628-663). Even NAB ultimately lost enthusiasm for Dr. Rosston's analysis. Panel Report at 50, n. 25. Nevertheless, the Panel relied on that analysis to confirm and corroborate the Bortz Study results for NAB. Panel Report at 50. Considering that Dr. Rosston's regression analysis was found to be so flawed, the Panel failed to articulate its reasoning for relying upon this study for any reason other than the similarity to the Bortz Study results. *Id.* The Panel, in effect, accepted that a coincidental or contrived analogy with another study in this proceeding lends more credibility to the regression analysis than that warranted by an examination of record evidence.

Furthermore, assuming *arguendo* that Dr. Rosston's regression analysis was useful corroborative evidence, the Panel arbitrarily evaluated its corroborative effect only on the Bortz Study, and ignored its corroborative effect on other methodologies such as the Nielsen Studies results or Dr. Gruen's proposed shares. Below is a comparison of results of Dr. Rosston's regression analysis with both the Bortz Study and Dr. Gruen's 2+ viewing midpoint avidity adjustment.

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[30] Dr. Rosston also lacks expertise in program valuation. By his own admission, prior to this proceeding, except for a handful of projects with little connections to the cable television world, Dr. Rosston had no experience with how program choices are made by cable systems, had no experience with program valuations, had no experience with cable subscriber attitude or behavior. Rosston, Tr. 2723-31.

Comparison of Rosston Results with Bortz and Gruen 2+ Midpoint Adjustment Distribution*

Category	*Program Suppliers*	*Commercial*				*Combined Differential*
		JSC	*TV*	*PTV*	*Devotional*	
Bortz	38.75	37.90	14.75	2.90	5.50	
Rosston	48.87	32.65	10.93	7.54	0.00	
Gruen 2+ Midpoint Adjustment**	45.05	35.80	11.00	7.95	0.15	
Differential Between Rosston and Bortz	10.12	5.25	3.82	4.64	5.50	29.33
Differential Between Rosston and Gruen 2+ Midpoint Adjustment	3.82	3.15	0.07	0.41	0.15	7.60

*1998-199 Average
**Uses Gruen Methodology

Plainly, Dr. Rosston's regression shares corroborate Dr. Gruen's analysis, rather than the Bortz Study results. If Dr. Rosston's analysis is to be given any weight at all, the fact that it is far more corroborative of Dr. Gruen's analysis is important evidence that should have been evaluated by the Panel.

4. Music's award should be no more than 2.3%.

The Panel Report, with one exception, failed to clearly articulate the rationale for its award of royalties to the Music Claimants. The Panel adequately explained its decision to reject Music's proffered study, but failed to give similar treatment to the rejection of the alternate music study that JSC submitted. Further, the Panel Report failed to provide factual support for purported weaknesses in Dr. Schink's analysis, applied an unsupported "tried and true" standard, guessed at the impact Music rebuttal witnesses may have made on Dr. Schink's report, and randomly reduced Music's award with no mathematical explanation. Each of these failings demonstrates that the Panel award to Music was arbitrary.

a. The Panel clearly articulated the rationale for determining that Music's study is not useful for allocating its award.

The Panel effectively pointed to facts and legal conclusions that support its rejection of the Music Use Study, which Music claimants proffered in their direct case. The Panel noted at least eight methodological flaws in the study.[31] Panel Report at 78-82. Furthermore, it addressed the inherent conceptual flaw in the Music Use Study: that it equated time with value. *Id.* at 82 n. 55.

b. The Panel failed to clearly articulate a rationale for using the Schink study as a "floor" rather than a ceiling and this "floor" concept runs counter to record evidence.

Unlike its thorough consideration of the Music Use Study, the Panel gave cursory consideration to the analysis that JSC witness, Dr. Schink, presented. Dr. Schink presented a study that compared broadcast television programming expenditures and concluded that the average expenditure for music license fees was 2.33%. The Panel found that, "for reasons already addressed, and because inclusion of network data may have the effect of somewhat artificially decreasing the percentage of music license fees compared to broadcast rights expenses" the 2.33% allocation of Music's license fees is a floor. *Id.* at 87.

The Panel failed to clearly articulate what it meant by "for reasons already addressed" in its finding that Dr. Schink's study sets the floor. Indeed, the Panel found Dr. Schink's analysis

[31] (1) Dr. Boyle used both distant and local carriage royalties to choose sample stations. Panel Report at 76 n. 48; (2) the stations chosen in the comparison years did not bear the same economic weight through the time periods; (3) one of the compared stations switched from independent to commercial network status between the periods, Id. at 76 n. 49; (4) in 1991-92 the top-five fee generating station represented 80.2% of the total fees generated whereas in 98-99 the top-five stations only represented 61.3% of the fees, Id. at 76 n. 50; (5) the absolute dollar cutoff for a station to be classified as one of the top-five fee generating stations declined significantly between the periods, Id. at 77; (6) there was a minor error in the selection of the composite week that comprise the sample of days studied, Id. at 77 n. 52; (7) each minute of music was given equal weight in the analysis, despite the type of use, Id. at 77; (8) the weights used with the data were random rather than constant, which invalidated the confidence intervals. Id. at 77 n. 54.

very credible. For example, the Panel stated, "we find that the broadcast television industry ratio of music expenses to total broadcast rights expenses is at least one reasonable measure of Music's relative value to CSOs and is entitled to some weight in this proceeding" *Id.* at 85. Further, the Panel explained that Dr. Schink's study is superior to that which the 1978 CRT relied upon because it solves for the past problem of inflated music license fees due to the Network Affiliate programming purchase structure. *Id.* at 85-86. Also, the Panel noted that Dr. Schink appropriately represented the impact of Fox, UPN, WB, and PAX on programming expenses and used the same study Music's own witness, Dr. Boyle, relied upon in another proceeding. *Id.*

Essentially, the Panel articulated no reasoning or determinations of fact in its findings regarding Dr. Schink's license fee analysis that indicated a lack of reliability in the results. The only other basis the Panel cited was the inclusion of network programming expenses in Dr. Schink's analysis. As demonstrated below, that does not provide a basis to discount Dr. Schink's analysis.

In support of its analysis and finding that "network data may have the effect of somewhat artificially decreasing the percentage of music license fees compared to broadcast rights expenses," the Panel relied on Music's proposed findings, PFFCL, ¶¶ 61, 158-61, and Music Exhibit 2-RX. *Id.* at 85, 87. A review of these portions of the record demonstrates that the Panel's reliance was erroneous.

The portions of the record upon which the Panel relied do not provide any real support for the conclusion that including network data in Dr. Schink's study is a serious flaw. Music PFFCL ¶ 61 is expositional, and shows that the 1978 CRT did not rely on music license fee data collected from networks. Music PFFCL ¶¶ 158-61 demonstrates that Dr. Schink's study includes

combined expenses of networks and local television stations, *Id.* ¶ 158; that the 1978 and 1979 CRTs did not use network data in their license fee analyses, *Id.* ¶ 159; that the CRT did not consider network data because network programming is not compensable in these proceedings, *Id.* ¶ 160; that using network data is a novel approach; and that no one disputes that networks pay substantial sums for sports, first-run series and feature films. *Id.* ¶ 161. Music Exhibit 2-RX is a re-calculation of a portion of Dr. Schink's study that Schink vigorously asserted was based upon faulty methodology. Schink Tr. at 8600 ("this has absolutely nothing to do with anything I've done in my testimony.") and Tr. 8601 ("what you're doing is ignoring all published information on detail and doing wholesale calculations based on what I consider to be relatively nonsensical numbers.").

The case law and record evidence about the bulk licensing system demonstrated that inclusion of networks in the data would not skew the study results. The reasonable rate for a music performance license is based upon the amount of music used, the revenues of the music user, previously paid rates for that and similar users, changes in revenues, and other pertinent circumstances. Music PFFCL ¶ 53; Boyle Tr. 4418-20, 4438-39, *U.S. v. Am. Soc'y of Composers, Authors & Publishers* (Capital Cities/ABC, Inc.), 831 F.Supp. 137, 144, 156 (S.D.N.Y. 1993). Thus, any increase in network programming expenses that Dr. Schink analyzed is inherently factored into the corresponding music license fees. There is no skew; rather, network data accurately represents how commercial parties value music.

The Panel also summarily accepted Music's faulty assertion that they demonstrated a skewing of results when network expenditures were included in Dr. Schink's analysis. The Panel relied on Music PFFCL ¶ 169, which, in turn, referenced the cross-examination of Dr. Schink at Tr. 8597 – 8622. However, Dr. Schink did not concede the point Music claimants

assert in Music PFFCL ¶ 169. In fact, Dr. Schink emphatically repudiated the methodology that supported the point Music attempted to make. Tr. 8601-02. Even Music agreed that it made a weak point, when it stated, "it is impossible to calculate the precise impact of Dr. Schink's decision to depart from the approach utilized by the CRT and to include network data [in his study]." Music PFFCL ¶ 169.

Thus, the failure to clearly articulate a rationale for using Dr. Schink's analysis as a floor is cause for modification of the Panel's award to Music. 1990-92 Distribution Order, 61 Fed. Reg. at 55,656.

c. The Panel's rejection of the Schink study discriminates among the parties.

The Panel gave little weight to Dr. Schink's study and asserted that the "Schink approach is not time-tested." Panel Report at 88. There is no requirement of a "time tested" methodology for allocating fees. As the Court of Appeals said in an earlier royalty distribution proceeding, "shorthand and tossaway, conclusory sentences are no way to handle a multi- million dollar proceeding." *National Association of Broadcasters v. Copyright Royalty Tribunal*, 772 F. 2d 922, 931 n.10 (D.C. Cir. 1985); 1990-92 CARP Proceeding, 61 Fed. Reg. at 55662-63.

d. Music's award was based on an arbitrary reduction from a previous award.

The Panel gave no reason for a .5% decrease from Music's last litigated award as opposed to any other amount. Panel Report at 89. As such, the reduction is a patently arbitrary reduction and cannot be sustained.

e. Dr. Schink's status as a rebuttal witness does not warrant a refusal to accept his testimony.

The Panel rejected Dr. Schink's study in part because Music was not afforded the opportunity to present rebuttal witnesses for the study. Contrary to the Panel's assumption,

Music witness, Dr. Boyle, presented hours of testimony about license fees. *See e.g.* Tr. 4504-4680; 4706-4768. In fact, most of Dr. Schink's data for his study came from information that Dr. Boyle mentioned in his testimony. Tr. 8612, 8659, 8746, 8754. Music Claimants cross-examined Dr. Schink for an entire day and fully used its opportunity to attack the mathematics and structure of Dr. Schink's study. *See*, Tr. 8491-8783. Because the source of Dr. Schink's data was uncontested and Music thoroughly cross-examined Dr. Schink, there is nothing to suggest that a Music rebuttal witness would have had any impact on Dr. Schink's analysis.

The Panel summarily determined that there might have been a different outcome if Music could have presented rebuttal witnesses, so they guessed at what impact a witness might have made when they refused to rely on the Schink study. The Panel supplied no explanation to evaluate the impact a Music rebuttal witness may have had on Dr. Schink's proffered percentages. This failure to articulate a satisfactory explanation for its action and citing a rational connection between the facts found and the choice made is arbitrary and a reason for modification of the Report. 1990-92 CARP Proceeding, 61 Fed. Reg. at 55662-63.

IV. CONCLUSION

For the foregoing reasons, the Panel's Report must be substantially modified or rejected. Program Suppliers request that the Librarian enter an order that is reasonable, consistent with the record evidence in this proceeding and in accordance with the statutory plan for distribution of cable copyright royalties.

CERTIFICATE OF SERVICE

I, Michael E. Tucci, hereby certify that I have caused a copy of the foregoing document in Docket No. 2001-8 CARP CD 98-99 to be served via hand-delivery or Federal Express as indicated below, this 4th day of November 2003, to the following:

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APPENDIX